

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Comprehensive Review of Universal Service Fund Management, Administration, and Oversight)	WC Docket No. 05-195
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Schools and Libraries Universal Service Support Mechanism)	CC Docket No. 02-6
)	
Rural Health Care Support Mechanism)	WC Docket No. 02-60
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Changes to the Board of Directors for the National Exchange Carrier Association, Inc.)	CC Docket No. 97-21
)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS**

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION AND SUMMARY.....	1
II. THE COMMISSION SHOULD MAINTAIN THE CURRENT NECA AND USAC STRUCTURES.....	3
III. THE COMMISSION SHOULD APPOINT A SPECIFIC FCC CONTACT OR GROUP WITHIN THE FCC TO WORK DIRECTLY WITH USAC ON NECESSARY USF ADMINISTRATION, MANAGEMENT, OVERSIGHT, AND PERFORMANCE MATTERS.....	4
IV. THE COMMISSION SHOULD MAKE TRANSPARENT THE USAC CONSULTATIONS WITH THE FCC REGARDING CODIFIED USF REGULATIONS.....	5
V. AUDIT PLANS SHOULD BE TARGETED TO HIGH-RISK AREAS, AND SHOULD RECOGNIZE THE EXTENT TO WHICH RLECS ARE ALREADY AUDITED/REVIEWED BY INDEPENDENT EXTERNAL AUDITORS, USAC, OTHER AGENCIES, AND NECA.	6
VI. THE FCC SHOULD ALLOW USAC TO COLLECT INTEREST AND PENALTIES FROM DELINQUENT CONTRIBUTORS AND UNSUCCESSFUL USF CHALLENGERS.	9
VII. THE USAC SHOULD DEVELOP A CONTINUITY OF OPERATIONS PLAN IN CONJUNCTION WITH THE FCC.	11
VIII. CONCLUSION.....	13

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INITIAL COMMENTS**

I. INTRODUCTION AND SUMMARY

The National Telecommunications Cooperative Association (NTCA)¹ hereby files its initial comments in response to the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking seeking comment on proposed rules and tentative conclusions regarding the management, administration, and oversight of the Universal Service Fund (USF)

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 560 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

mechanisms.² In these comments, NTCA provides several suggestions to improve select, limited, aspects of the high-cost and low-income USF mechanisms. NTCA recommends that the Commission not dramatically change the overall management structure of the USF mechanisms, particularly the relationship between the National Exchange Carrier Association (NECA) and the Universal Service Administrative Company (USAC). The current management structure of the high-cost and low-income USF mechanisms has worked efficiently for many years. NTCA members, many of whom are USF contributors and beneficiaries, are, in general, satisfied with the overall structure and management of the high-cost and low-income USF mechanisms. This system has enabled the Commission to achieve a more than 93 percent penetration rate for providing affordable voice service in U.S. households.³ The vast majority of the over 1000 participants in these programs have properly qualified for support and have used their support for the purposes intended. This record demonstrates the general stability of the high-cost and low-income USF mechanisms and its management structures.

NTCA also recommends that the Commission appoint a specific FCC contact or group within the FCC to work directly with USAC on necessary USF administration, management, oversight, and performance matters, and keep open to the public all USAC/USF consultations regarding interpretations of codified FCC regulations. The Commission should ensure the reliability of the USF mechanisms by targeting audits for high-risk contributors and recipients and by allowing USAC to charge and recover interest and penalties from late filers and

² *In the Matter of Comprehensive review of Universal Service Fund Management, Administration and Oversight*, WC Docket No. 05-195; *Federal-State Joint Board on Universal Service*, CC Docket No. 94-65, *Schools and Libraries Universal Service Mechanism*, CC Docket No. 02-6, *Rural Health Care Support Mechanism*, WC Docket No. 02-60, *Lifeline and Link-Up*, WC Docket No. 03-109, *Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, FCC 05124, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. June 14, 2005) (NPRM).

³ Federal Communications Commission, Trends in Telephone Service, April 2005, Table 16-1. Available online at www.fcc.gov/wcb/trends.html.

unsuccessful challengers. Finally, the Commission should direct USAC, with FCC guidance, to create and maintain a Continuity of Operations Plan (“COOP”) that will meet the combined needs of telecommunications carriers, emergency first-responders, and end-user customers.

II. THE COMMISSION SHOULD MAINTAIN THE CURRENT NECA AND USAC STRUCTURES.

The existing dual administrative structure of NECA providing cost data, and the USAC handling the administrative tasks associated with the high-cost universal service and low-income programs, remains functional and appropriate, so the Commission should not alter significantly this dual structure. USAC and NECA have a thorough knowledge and understanding of the telecom industry, particularly circumstances faced by small rural incumbent local exchange carriers (RLECs) providing service in high-cost areas. Since the early 20th century, RLECs have invested in facilities to provide affordable basic telephone service to nearly 40 percent of the geographic area of the United States.

During the last two decades, rural carriers have continued to invest in rural, high-cost and insular areas in the United States based on a system of rate-of-return regulation, NECA pooling, and universal service support. This existing regulatory structure, including NECA and USAC, has allowed the Commission to meet its Congressional mandate to ensure rural consumers access to equivalent telecommunications services at prices that are comparable to those charged urban consumers. Rural carriers therefore have a strong interest in ensuring that reforms to the universal service rules provide for cost recovery consistent with their past decisions to invest in networks and incur costs under the then lawful regulatory rules.

In view of the interrelationship between high-cost universal service funding and access charges, the Commission should encourage the USF Administrator to work closely with NECA

to ensure settlement processes that are smooth and seamless for the benefit of the RLECs and their rural customers. NECA has a key role in administering access charges, per FCC rules, and should be provided with timely and complete access to information on USF payments to RLECs that participate in the NECA pools or use NECA for receipt of high-cost funds.

The current Part 36 data collections have been going on for years, work well, and should be left in place. No alteration to the forms or the collection process is necessary. Furthermore, high-cost loop data collections are tightly integrated with other RLEC cost and demand data. It makes sense, therefore, for NECA to continue to collect and validate all data. NECA has review procedures in place that are tried and proven, and NECA can accurately identify procedural gaps that may occur during its reviews. The Commission should consider favorably those procedural modifications that NECA may propose as part of this docket. Duplicating these procedures would be unnecessary and would impose undue administrative burdens on small RLECs. In view of concerns regarding fraud, waste, and abuse in the program, the Commission should not eliminate the NECA review processes, since this validation adds credibility to the high-cost program.

III. THE COMMISSION SHOULD APPOINT A SPECIFIC FCC CONTACT OR GROUP WITHIN THE FCC TO WORK DIRECTLY WITH USAC ON NECESSARY USF ADMINISTRATION, MANAGEMENT, OVERSIGHT, AND PERFORMANCE MATTERS.

The Commission should designate a USAC contact person or working group within the FCC's existing structure to assist USAC in administering the USF mechanisms and to provide USAC with timely guidance and performance evaluations. Currently, USAC has no designated point of contact and, consequently, the USF Administrator must seek the appropriate person each time for guidance. By designating one person, or a specific working group, the Commission will

provide USAC with more certainty and efficiency in clarifying ambiguities that arise during the course of its administration of the USF. Furthermore, an FCC contact person will provide better coordination of actions, such as those necessary in emergency response situations.

IV. THE COMMISSION SHOULD MAKE TRANSPARENT THE USAC CONSULTATIONS WITH THE FCC REGARDING CODIFIED USF REGULATIONS.

The Commission should establish and maintain an open process allowing interested parties to comment on consultation questions USAC submits to the FCC concerning interpretations of codified FCC universal service rules. The Commission should assure that high-cost programs are administered in an open, responsive manner, taking into account diverse input and expertise. The Commission should establish procedures as part of this proceeding that permit interested parties to offer input as to how ambiguous administrative issues should be resolved. If there are multiple interpretations to a Commission rule and USAC seeks clarification from the FCC, these USAC inquiries should be made public and interested parties should be afforded notice and an opportunity to comment prior to USAC action. This approach will minimize carrier surprise and regulatory uncertainty by informing affected parties of the issue and allowing them to participate prior to Commission resolution of the ambiguity.

One example where a more transparent process would have been useful to affected parties is the pending “Safety Net Additive Support” docket, currently under review with the Commission.⁴ When USAC sought FCC guidance in 2003 on the proper interpretation of the

⁴ *In the Matter of Darien Telephone Company, Inc., Logan Telephone Cooperative Inc., and Roanoke & Botetout Telephone Company Request for Review of the Universal Service Administrative Company’s Decision’s Regarding Safety Net Additive Support*, CC Docket 96-45, DA 05-1953 (Public Notice) (rel. July 6, 2005). In *Darien*, the petitioners seek reversal of a USAC determination that the petitioners had to refund substantial amounts of their Safety Net Additive Support funds due to USAC’s retroactive recalculation of the support mechanism. At issue in the petition is whether the USAC exceeded its authority and violated due process by applying the calculation retroactively and not notifying the petitioners in advance or allowing the petitioners to comment or participate in

Safety Net Additive (“SNA”) rule, neither USAC nor the FCC provided public notice that USAC’s calculation of SNA support may be interpreted by the FCC’s Wireline Competition Bureau or that based on this interpretation, carriers may be required to refund SNA support. Carriers and other interested parties were not provided the opportunity to comment or submit evidence concerning the proper calculation of SNA support and whether that calculation should be applied on a prospective and/or retroactive basis. While NTCA and petitioners await the Commission’s decision in this docket, a rule change that requires transparency may prevent this issue from arising again.

V. AUDIT PLANS SHOULD BE TARGETED TO HIGH-RISK AREAS, AND SHOULD RECOGNIZE THE EXTENT TO WHICH RLECS ARE ALREADY AUDITED/REVIEWED BY INDEPENDENT EXTERNAL AUDITORS, USAC, OTHER AGENCIES, AND NECA.

Audits can be an effective tool for monitoring the disbursement of universal service funds.⁵ However, it is important that these audits be directed to those areas where fraud is more likely to occur. Similarly, all of the various parties conducting audits should coordinate efforts to avoid duplicative audits and to maximize the effectiveness of the resources expended in the audit process.

In the interest of fairness, it is critically important that the audit burdens imposed on ILECs and CETCs be equivalent. Currently, that is not the case. ILECs are audited based upon their cost data. Completion of such an audit, which requires compiling, categorizing and analyzing a rather large quantity of detailed data, may take approximately two to four weeks.

USAC’s consultation with the Commission regarding the recalculation. NTCA Initial Comments filed August 5, 2005, p. 3.

⁵ As the Notice points out, to date, USAC has recovered approximately \$7.6 million for all violations of Commission rules with an additional \$4.5 million subject to pending appeals and \$19.5 million still under review (NPRM ¶ 70).

During this time, the ILEC must devote resources to assisting the auditors, resources which would otherwise be put to use serving customers.

Competitive eligible telecommunications carriers (CETCs), on the other hand, are currently audited on the basis of their line counts. Such data is easily gathered and readily available. Consequently, these audits may typically be completed within two to four hours. Far fewer resources are ultimately dedicated by the CETC to the audit process.

NTCA believes that a more stringent review of CETC use of universal service funding is required. According to the Commission's eligible telecommunications carriers (ETC) designation rules, carriers designated as CETCs by the Commission are required to submit five-year buildout plans, detailing their proposed future activities. In accordance with Section 254(e) of the Act, which stipulates that universal service support be used only for the purposes intended, these carriers should be required to connect the funding received with their buildout plan. Any use of universal service funds for purposes not directly related to the accomplishment of goals outlined in their buildout plan should be closely scrutinized.

The most efficient way to insure that the provisions of Section 254(e) are being fulfilled is to eliminate the identical support rule.⁶ Currently, the rule allows CETCs to receive support based solely on the incumbent's costs, regardless of their own. In those instances where the competitor's costs are lower than the incumbent's, the competitor receives excess support and would likely violate the sufficiency requirement also contained in section 254(e). The United States Court of Appeals for the 5th Circuit has already warned: "excessive funding may itself violate the sufficiency of the Act."⁷ The stated goal of this NPRM is to eliminate waste in the

⁶ 47 C.F.R. §54.307(a).

⁷ 47 U.S.C. §254(d).

program.⁸ Providing a CETC with support in excess of their costs is an example of waste that can be relatively easily remedied through the elimination of the identical support rule.

The Commission recently issued a Public Notice seeking comment on four proposals developed by Federal-State Joint Board on Universal Service (Joint Board) members and staff to modify the high-cost USF rules.⁹ Two of the four proposals advocated the elimination or modification of the identical support rule. Joint Board member Billy Jack Gregg proposes that “[b]asing embedded cost support on each carrier’s own costs would prevent potential windfalls to competitive ETCs with lower cost structures than incumbents.”¹⁰ In another proposal, Joel Shifman, Peter Bluhm, and Jeff Pursley note that the identical support rule “can have the overall effect of financing competitive CETC networks with universal service.”¹¹ They recommend that wireless CETCs, which have drastically different cost characteristics and geographic scales than wireline carriers, “no longer be funded by ‘portable’ universal service support that is based on the costs of incumbent wireline carriers.”¹²

NTCA supported these portions of the Gregg and Shifman, Bluhm and Pursley proposals and urged the Joint Board to recommend that the proper appropriate approach to control the growth of the high-cost fund is to eliminate the identical support rule and require CETCs to base their support on their own costs.¹³ Further, NTCA noted that the identical support rule “defeats the Commission’s guiding principles of ‘competitive neutrality’” and “has undermined the

⁸ NPRM ¶ 1 and 69.

⁹ FCC Public Notice, *Federal-State Joint Board on Universal Service Seeks Comment on Proposals to Modify the Commission’s Rules Relating to High-Cost Universal Service Support*, CC Docket No. 96-45, rel. August 17, 2005.

¹⁰ *Id.* at Appendix B, p. 10.

¹¹ *Id.* at Appendix B, p. 26.

¹² *Id.*

¹³ NTCA Initial Comments, p.11, *In the Matter of Federal-State Joint Board on Universal Service Seeks Comment on Proposals to Modify the Commission’s Rules Relating to High-Cost Universal Service Support*, CC Docket No. 96-45, September 30, 2005.

Commission's ability to ensure that CETC support is not excessive and used for the purposes intended."¹⁴ Repeal of the rule will eliminate a potentially significant source of waste in the high-cost fund.

VI. THE FCC SHOULD ALLOW USAC TO COLLECT INTEREST AND PENALTIES FROM DELINQUENT CONTRIBUTORS AND UNSUCCESSFUL USF CHALLENGERS.

The FCC should consider adopting rules that allow USAC to recover interest on untimely USF contributions arising from a carrier's failure to file timely USF reports or contribute to the USF, and to allow retroactive recovery of those sums following notice and an opportunity for comment by the delinquent carrier. USAC should also be allowed to collect interest and, if warranted, seek penalties from carriers who unsuccessfully challenged their USF allocations. The Commission should require USAC to charge carriers carrying costs at a specified or quantifiable interest rate for untimely reports or contributions as this sum represents lost opportunity costs for the USF beneficiaries. USAC should exercise its discretion, however, in assessing penalties for willful or repeated delinquents and should follow the guidelines used by the Commission's Enforcement Bureau in pursuing such violations.¹⁵ *See, e.g., In the Matter of BCE Nexxia, Inc.*¹⁶ Alternatively, the Commission should direct USAC to refer suspected USF

¹⁴ *Id* at 12.

¹⁵ *In the Matter of Locus Telecommunications*, Order, File No. EB-04-IH-0519, DA 05-2485 (rel. October 3, 2005) (Commission adopts consent decree for \$330,000 as "voluntary contributions" relating to the Bureau's investigation into the company's USF reporting and contribution requirements). *See also In the Matter of BCE Nexxia Corporation*, Notice of Apparent Liability for Forfeiture, File No. EB-04-IH-0394, FCC 05-167 (rel. September 13, 2005) (NAL for \$282,000 for company's willful or repeated violations and failure to file FCC Form 499-A, Annual Telecommunications Reporting Worksheets and make USF contributions); *In the Matter of Telecom House, Inc.*, Notice of Apparent Liability for Forfeiture, File No. EB-04-IH-0656, FCC 05-168 (rel. Sept. 13, 2005) (NAL for \$529,300 for the company's willful or repeated failure to register with the Commission, to file USF worksheets, and to make USF and telecommunications relay service contributions).

¹⁶ "Under section 503(b)(1) of the Communications Act of 1934, as amended (the "Act"), any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty. Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act,

contributor violations to the Commission's Enforcement Bureau for prompt investigation, given the Commission's one-year statute of limitations for forfeiture penalty assessments.¹⁷

This balanced approach will ensure that compliant carriers are not overburdened and that USF beneficiaries receive their fair share in a timely manner. The Commission correctly recognized the impact that delays on filing reports and submitting contributions has on USF beneficiaries:

When USAC or the Commission cause delay, schools and libraries can be thrown off their mandated budget or procurement schedules. This can have a significant negative impact on schools' and libraries' ability to achieve connectivity goals. Sometimes delay can complicate the USAC application process for schools and libraries, leading to ministerial errors on subsequent applications, complicating auditing, and undermining our ability to combat waste, fraud, and abuse.¹⁸

The same rationale applies to all USF recipients, a fact the Commission clearly recognized in a recent USF contribution enforcement action.¹⁹

The Commission should also require USAC to collect interest and additional sums from carriers who unsuccessfully challenge their USF obligations. This approach will mirror the

irrespective of any intent to violate" the law. The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act and the Commission has so interpreted the term in the section 503(b) context. The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. "Repeated" means that the act was committed or omitted more than once, or lasts more than one day. To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed. The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has willfully or repeatedly violated the Act or a Commission order or rule." *BCE Nexxia Corporation*, Order, Par. 11.

¹⁷ 47 U.S.C. § 503(b)(6)(B); 47 C.F.R. § 1.80(c)(3).

¹⁸ NPRM ¶ 38.

¹⁹ *In the Matter of BCE Nexxia Corporation*, Order ¶ 14: "The failure of a carrier such as BCE Nexxia to abide by its federal filing obligation has a direct and profound detrimental impact by removing from the base of USF contributions telecommunications revenues that otherwise should be included, thereby shifting to compliant carriers additional economic burdens associated with the federal universal service program. Consequently, a carrier's failure to file required Worksheets thwarts the very purpose for which Congress enacted section 254(d) – to ensure that every interstate carrier "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." Viewed in this context, the Telecommunications Reporting Worksheet is not only an administrative tool, but a fundamental and critical component of the Commission's universal service program."

delayed filing interest and penalty approach discussed above, will allow USAC to recoup lost use of the USF funds that accrued during the challenge period, and will deter frivolous USF obligation challenges. Had this approach already been in place, USAC, for example, could have recovered interest on the \$160 million AT&T claimed it “saved” since 1999 by not counting certain enhanced prepaid calling card revenues for USF support purposes.²⁰ Even though AT&T ultimately lost its USF obligation challenge on prepaid calling card revenues, AT&T achieved, essentially, an interest-free loan of nearly \$3 million for more than a year and a half, which represents an economic advantage over USF compliant carriers. This example clearly demonstrates the detrimental effect on USF contributions, compliant carriers and USF beneficiaries that USF obligation challenges create. Failure to require USF contributors to pay interest and penalties, where warranted, will reward and encourage more USF contributor challenges.

VII. THE USAC SHOULD DEVELOP A CONTINUITY OF OPERATIONS PLAN IN CONJUNCTION WITH THE FCC.

The Commission sought comment on whether to require the USAC to develop and maintain a Continuity of Operations Plan (“COOP”) to address emergency situations.²¹ Several Congressional leaders recently criticized the Commission’s quick but disjointed USF response to

²⁰ *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, Order (rel. February 23, 2005) (“AT&T Order”), p. 3, n. 14. AT&T filed its petition on May 15, 2003, and the Commission issued its ruling on February 23, 2005, a period of 21 months. AT&T stopped reporting calling card revenues for universal support purposes in 1999. AT&T Order, p. 3, n. 14. The Commission’s ruling required AT&T to file revised USF reports but did not require AT&T to remit interest on the funds at risk for that time period. AT&T Order, ¶ 31. If the Commission had in place a rule that allowed collection of interest on contested USF obligations, the interest that would have accrued on \$160 million is sizable, even for the 21 month period during which AT&T sought review. Assuming a modest 1% annual interest rate, the interest accrued is \$2.8 million (\$160 million x 1% annual interest rate x 21/12 months = \$2,800,000). This is a very simplistic calculation that does not reflect compounding of interest and may not reflect the actual “savings” AT&T achieved by delaying payment; this is, however, an example of the impact that delayed contributions have on the USF and its recipients.

²¹ NPRM ¶23.

Hurricane Katrina, calling for a more coordinated and justified response that will restore communication systems in impacted areas. The Commission should direct the USAC, with FCC guidance, to develop, maintain, and implement a COOP with procedures that reflect the immediate and long-term communications needs of the telecommunications carriers' systems, the emergency first responders (such as the fire, police, medical, U.S. National Guard and U.S. Coast Guard), and end-user customers. This COOP should include the actions necessary for USAC and the FCC to address those extreme emergency situations such as those encountered during the September 11, 2001 World Trade Center terrorist attack and the August/September 2005 Hurricane Katrina/Rita natural disasters.

Most importantly, however, is that the Commission and the USAC work together to establish and implement the COOP to create an informed and coordinated emergency response. The USAC should not be forced to act, or react, in a vacuum in implementing the FCC's directives regarding USF collections and disbursements. Chairman Martin's September 15, 2005 call to create a new FCC Public Safety/Homeland Security Bureau is very timely and could lead to the creation of the USAC/FCC COOP.

VIII. CONCLUSION

Based on the above reasons, the Commission should not dramatically alter the existing overall structure of the NECA and USAC in administering the USF, target the USAC audits, allow USAC to charge interest and (where appropriate) penalties against delinquent and unsuccessful USF obligation challengers, and create and maintain a Continuity of Operations Plan with USAC that will meet emergency response needs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in WC Docket No. 05-195, FCC 05-124 was served on this 18th day of October 2005 by electronic mail to the following persons.

/s/ Gail Malloy

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